

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

4	ISTRICE, <i>et al.</i>)	3:11-cv-00280-RCJ-VPC
5	v.)	
6	MORTIN, <i>et al.</i>)	<u>ORDER</u>
7	v.)	
8	Defendants.)	

9 Before the court is plaintiffs' application for leave to proceed *in forma pauperis*,
 10 accompanied by their *pro se* civil rights complaint and exhibits, which they filed on April 20, 2011
 11 (#1).¹ Plaintiffs also filed a "supplemental civil complaint" on August 26, 2011, which adds
 12 Hearthstone of Northern Nevada as a defendant (#3). In their application and financial affidavit,
 13 plaintiffs indicate that they receive \$500.00 per month in disability benefits. *Id.* Plaintiffs claim that
 14 their monthly expenses total over \$400.00. *Id.* at 2. Based upon the foregoing, the court grants
 15 plaintiffs' application to proceed *in forma pauperis*. However, the court's preliminary review of
 16 plaintiffs' complaint (#1-1) and supplemental civil complaint (#3) reveals that they fail to state a
 17 claim upon which relief may be granted in this court; therefore, the complaint is dismissed without
 18 prejudice and with leave to amend pursuant to this Order.

19 Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915, which provides
 20 that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal
 21 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks
 22 monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i)-
 23 (iii). Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 24 provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same standard
 25 under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint.
 26 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp.*

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 28 ¹ Refers to the court's docket numbers.

1 *of America*, 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic
2 recitation of the elements of a cause of action;” it must contain factual allegations sufficient to “raise
3 a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
4 (2007). “The pleading must contain something more . . . than . . . a statement of facts that merely
5 creates a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller,
6 Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). In reviewing a complaint under
7 this standard, the court must accept as true the allegations of the complaint in question, *Hosp. Bldg.*
8 *Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most
9 favorable to plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S.
10 411, 421 (1969).

11 Allegations in *pro se* complaints are held to less stringent standards than formal pleadings
12 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-
13 21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
14 1990). “To sustain an action under Section 1983, a plaintiff must show (1) that the conduct
15 complained of was committed by a person acting under color of state law; and (2) that the conduct
16 deprived the plaintiff of a federal constitutional or statutory right.” *Wood v. Ostrader*, 879 F.2d 583,
17 587 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

18 Plaintiff Segayle Istrice was a patient at the Rosewood Rehabilitation Center (#1-1, p. 1).
19 Plaintiffs allege that defendants Lynda and Tom Mortin² “collected money from [plaintiffs’] health
20 insurance company to pay the expenses incurred while in care and custody of the Rosewood care
21 center.” *Id.* Plaintiffs further claim that under Ms. Mortin’s care, plaintiff Segayle Istrice contracted
22 a food-borne illness, which “went untreated, then undiagnosed for a duration of time of which is
23 unknown.” *Id.* at 1-2. Plaintiff Segayle Istrice suffered immune, lower abdomen, and urinary tract
24 issues as a result of the infection, which she claims was not appropriately treated. *Id.* at 2. Plaintiffs
25 sue defendants for gross negligence, breach of contract, breach of medical duty and compliance to
26 rules and regulations of the state and federal law governing nursing care facilities, and deprived

² The caption of plaintiffs' complaint spells Mortin with an "i" while the body of the complaint spells Morton with an "o." The court is unsure which spelling is accurate.

1 indifference to elderly rights. *Id.*

2 In their supplemental civil complaint, plaintiffs add defendant Hearthstone of Northern
 3 Nevada, alleging that the State of Nevada documented deficiencies at Hearthstone, which violated
 4 applicable regulatory procedures and policies (#3, pp. 2-3). Plaintiffs go on to complain that both
 5 defendants Rosewood and Hearthstone violated regulations related to notifying residents of costs
 6 associated with care provided. *Id.* at 4. Plaintiffs also complain that the care provided for plaintiff
 7 Segayle Istrice's infections was inadequate and violated the policies of both facilities. *Id.* at 6.
 8 While plaintiffs do not name the State of Nevada as a defendant, they claim that when the State
 9 accepted assurances from defendant Hearthstone regarding its amelioration of cited deficiencies, it
 10 engaged in fraud with defendant Hearthstone. *Id.* at 8. In their supplemental complaint, plaintiffs
 11 request one million dollars in damages and ask the court to award summary judgment in their favor.
 12 *Id.* at 9.

13 As an initial matter, plaintiffs were not granted leave by this court to file a supplemental or
 14 amended complaint. There may be only one operative complaint in any action before this court. The
 15 court admonishes plaintiffs to refrain from filing additional pleadings without leave from the court.
 16 Additionally, in the future, plaintiffs must wait until after the court screens their complaint before
 17 filing additional papers. Second, plaintiffs did not name the State of Nevada as a defendant, but
 18 suggest in their supplemental complaint that the State engaged in unlawful activity. Courts may not
 19 rule on the rights of persons not currently before them. *Zepeda v. U.S. Immigration Serv.*, 753 F.2d
 20 719, 727 (9th Cir. 1985) (“A federal court may . . . not attempt to determine the rights of persons not
 21 before the court.”). Therefore, plaintiffs must include in the caption the names of all parties they
 22 deem to have violated their rights.

23 In addition to these deficiencies, plaintiffs' complaint fails to state sufficient facts to
 24 demonstrate a potential violation of their federal rights. Federal courts have original jurisdiction
 25 over a case when it is “founded on a claim or right arising under the Constitution, treaties or laws
 26 of the United States,” or when the amount in controversy exceeds the sum of \$75,000 and the
 27 citizenship of each plaintiff is different from that of each defendant. 28 U.S.C. §§ 1331, 1332(a).
 28 Plaintiffs claim that defendants engaged in gross negligence, depraved indifference to the rights of

1 the elderly, and breached their contract and medical duty. Without commenting on the viability of
 2 these claims, the court notes that they are not violations of federal law or the constitution. Further,
 3 plaintiffs do not allege that there is diversity of citizenship between themselves and the defendants.
 4 Therefore, the court does not have jurisdiction to hear this case.

5 Even if the court did have jurisdiction to hear the case, plaintiffs do not include any facts to
 6 suggest that defendants acted under color of state law when they perpetrated the alleged violations;
 7 therefore, plaintiffs fail to state a claim under Section 1983. *Wood*, 879 F.2d at 587. Simply
 8 working at a nursing home that receives federal funding does not necessarily establish that the
 9 workers in the facility act under color of state law. *See Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

10 As set forth above, this court does not have jurisdiction to hear plaintiffs' complaint. Even
 11 if the court did have jurisdiction, the facts as stated fail to state a claim under Section 1983.
 12 Therefore, it is recommended that plaintiffs' application to proceed *in forma pauperis* (#1) be
 13 granted and that their complaint (#1-1) be dismissed without prejudice. Plaintiffs are advised that
 14 a complaint pursuant to 42 U.S.C. § 1983 should set forth a concise statement of facts that
 15 demonstrate a violation of plaintiffs' civil rights and should identify the specific individuals, acting
 16 under color of state law, responsible for the alleged violations.

17 **IT IS THEREFORE ORDERED** that plaintiffs' application to proceed *in forma pauperis*
 18 (#1) is **GRANTED**.

19 **IT IS FURTHER ORDERED** that plaintiffs' complaint (#1-1) is **DISMISSED WITHOUT**
 20 **PREJUDICE** and with leave to amend according to this Order. The Clerk shall send to plaintiffs
 21 a blank form for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiffs are advised
 22 that pursuant to Local Rule 15-1, the amended complaint shall be complete in itself without
 23 reference to the previous complaint. Plaintiffs shall write the words "first amended" above the title
 24 "civil rights complaint" on the form.

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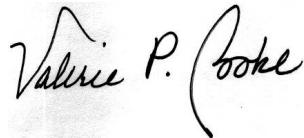
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1 **IT IS FURTHER ORDERED** that plaintiffs are **GRANTED** thirty (30) days from the date
2 of entry of this Order within which to file a first amended complaint remedying, if possible, the
3 defects in the complaint explained above. Plaintiffs' failure to do so may result in the immediate
4 dismissal of the entire action.

5 **DATED:** September 8, 2011.



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7 **UNITED STATES MAGISTRATE JUDGE**
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